Supreme Court, U.S.
FILED
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No. _____

In The
Supreme Court of the United States

CYNTHIA D. DEXTER,
Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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6 pgs

QUESTIONS PRESENTED

1. Is an agreement to arbitrate future employment disputes, signed at the time of hiring, enforceable against an employee when the agreement itself does not explicitly cover employment disputes or Title VII disputes, and the employer portrays the agreement as a mere formality.

2. Does an employer waive the right to compel arbitration of an employment dispute under Title VII by failing to invoke arbitration for several years while the dispute is pending before an administrative agency with power to wholly adjudicate the merits and order compensatory and injunctive relief.

PARTIES TO THE PROCEEDING

Petitioner

Cynthia D. Dexter, and natural person. Petitioner is an individual and has no corporate affiliations.

Respondents

The Prudential Insurance Company of America, a public corporation, and Bill S. Pinkerton; John DeVaney; Jack Palmer; Fred Dimmel, II; Jim Novack; Steve Zadeh, individuals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unpublished. A copy of the opinion is included herein as Appendix A. The final judgment of the United States District Court for the District of Kansas was entered on March 18, 1999. A copy is included as Appendix B. On the same date The District Court entered a Memorandum and Order overruling Plaintiff's Motion to Vacate Arbitration Award. This opinion was unpublished. A copy of the opinion is included as Appendix C.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on June 7, 2000. Petitioner filed a Motion for Extension of Time to file her Petition for Writ of Certiorari. The Court granted that Motion on August 23, 2000, extending the time to file the Petition to November 4, 2000. See Appendix F. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1), 2101(c) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Arbitration Act
U.S. Code

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an

existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Kansas Statutes Annotated

K.S.A. 44-1004. Powers and duties of commission. The commission shall have the following functions, powers and duties:

* * *

(8) To issue such final orders after a public hearing as may remedy any existing situation found to violate this act and prevent its recurrence.

K.S.A. 44-1005. Complaints; investigation; proceedings; remedial

* * *

(k) If the presiding officer finds a respondent has engaged in or is engaging in any unlawful employment practice or unlawful discriminatory practice as defined in this act, the presiding officer shall render an order requiring such respondent to cease and desist from such unlawful employment practice or such unlawful discriminatory practice and to take such affirmative action, including but not limited to the hiring, reinstatement, or upgrading of employees, with or without back pay, and the admission or restoration to membership in any respondent labor organizations; the admission to and full and equal enjoyment of the goods, services, facilities, and accommodations offered by any respondent place of public accommodation denied in violation

of this act, as, in the judgment of the presiding officer, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance. Such order may also include an award of damages for pain, suffering and humiliation which are incidental to the act of discrimination, except that an award for such pain, suffering and humiliation shall in no event exceed the sum of $2,000.

* * *

K.S.A. 44-1011. Enforcement of commission orders; judicial review; procedure. (a) The commission, attorney general or county or district attorney, at the request of the commission, may secure enforcement of any final order of the commission in accordance with the act for judicial review and civil enforcement of agency actions. The evidence presented to the commission, together with its findings and the order issued thereon, shall be certified by the commission to the district court as its return. No order of the commission shall be superseded or stayed during the proceeding on review unless the district court shall so direct.

STATEMENT OF THE CASE

Petitioner is a female who in 1988 applied for employment with Respondent as a sales agent. Responded had her take certain classes for several months before she could become employed. At the time of her hiring Petitioner was presented with a U-4 form, which was required for her to become registered with the National Association of Securities Dealers (NASD). She was told that this step was a mere formality, and she was not provided with a copy of the NASD Rules to which the U-4 form referred. (See Appendix G). The U-4 form contained a clause under which Petitioner agreed to submit to arbitration disputes arising under the rules

of the NASD "as amended." [1] At the time those rules provided for arbitration of disputes between members, such as Respondent, and Associated Members, such as Petitioner. They did not specifically include employment disputes. The NASD rules were amended in 1993 to provide specifically for disputes arising out of termination of employment, but said nothing about civil rights claims.

Petitioner filed Charges of Discrimination with the Equal Employment Opportunity Commission (EEOC) and the Kansas Human Rights Commission (KHRC) in 1993. In 1996 Petitioner filed an action in the Federal District Court for the District of Kansas charging Respondent and several individual employees with sexual harassment, hostile environment and retaliation under Title VII of the Civil Rights Act.[2] For the first time Respondent asserted the right to arbitration by means of motion to compel. The District Court granted that motion on October 7, 1996. Petitioner later filed a motion to reconsider which was also overruled on October 29, 1997. The case proceeded to arbitration, and the arbitration panel assigned to the case denied all of Petitioner's claims, without providing a reason for their decision. Petitioner filed a Motion to Vacate the Arbitration Award, which the District Court denied on March 17, 1999. On that same date, the

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[1] The clause provides : I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in Item 10 as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgement in any court of competent jurisdiction.

[2] Because of the procedural peculiarities of this case the district court was never asked to dismiss the individual defendants.

District Court entered judgment in favor of Respondent and dismissed Petitioner's suit. Petitioner filed a timely appeal to the United States Tenth Circuit Court of Appeals. The Court of Appeals affirmed the judgment of the District Court based on Tenth Circuit precedent holding arbitration agreements to be enforceable. The Court of Appeals entered its Order and Judgment by unpublished opinion on June 7, 2000. No motions to reconsider were filed.

ARGUMENT FOR GRANTING WRIT

There is currently confusion as to when private agreements to arbitrate employment disputes should be enforced. This court in *Gilmer v. Interstate-Lane Corp.*, 500 U.S. 20 (1991) held that these agreements are enforceable, but that courts should be sensitive to grounds for revocation of a contract. *Gilmer* was decided shortly before Congress passed the Civil Rights Act of 1991 (CRA), expanding rights and remedies to victims of discrimination prohibited by Title VII of the Civil Rights Act of 1964. Since *Gilmer* many courts have found pre-employment arbitration agreements enforceable, with hardly any analysis of contractual bases for revocation, or the effect of the 1991 CRA upon compulsory arbitration agreements.

However the Ninth Circuit Court of Appeals in *Duffield v. Robertson, Stevens & Co,* 144 F.3d 1182 (9th Cir. 1998) held that the 1991 CRA overruled *Gilmer*, precluding agreements to arbitrate future claims under Title VII. Two circuit courts of appeals have held that although the 1991 CRA does not preclude such agreements, it does require that victims of discrimination prohibited by Title VII be afforded some additional protection beyond traditional contract defenses.

In *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994) and *Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104 (9th Cir. 1997) the Ninth Circuit has held that although Title VII does not preclude compulsory arbitration, its purpose and spirit require that such agreements be enforced only upon a finding that the waiver of a right to a judicial forum was knowing and voluntary.

And in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1 (1st Cir. 1999) the First Circuit held the 1991 CRA requires that an compulsory arbitration agreement provide some notice that it encompasses Title VII claims before it can be enforced.

This court decided in *Gilmer* that nothing in the Age Discrimination in Employment Act (ADEA) showed congressional intent to preclude arbitration of claims under that Act. Courts have since almost uniformly held that the same conclusion applies to Title VII claims. But there is still a question as to whether Congress intended that the right to a judicial forum under Title VII be completely disregarded in every case involving arbitration agreements. As noted above, courts are split on this issue, and there is a dire need to resolve it.

In addition, this Court in *Gilmer* stated that enforcing arbitration agreements would not run counter to congressional intent to have civil rights disputes first processed with the Equal Employment Opportunity Commission (EEOC). The court stated that a party may still be free to file before the EEOC, and of the EEOC may also voluntarily pursue certain claims, without affecting enforceability of arbitration agreements. The court below apparently took that statement to mean that no amount of involvement of a party before an administrative agency can ever result in waiver of the right to

compel arbitration. This holding is contrary to well recognized federal case law that waiver occurs when a party engages in any conduct, at any level, pre-litigation or post-litigation, which is inconsistent with the right to arbitration, and more so if such inconsistent behavior results in any prejudice to the opposing party. In this case, the Respondent engaged in prolonged participation in proceedings before an agency which has not only conciliatory powers, but also the power to adjudicate, and grant relief, much in the same way of any court. This participation was inconsistent with the right to compel arbitration and should have resulted in waiver of that right. This Court has never decided this specific issue and it is an important one affecting application of federal law, namely Title VII of the Civil Rights Act and the Federal Arbitration Act. This Court should therefore grant certiorari to correct the erroneous application of federal law in this case and to set precedent regarding the issue of waiver of the right to arbitration in the context of employment disputes.

ARGUMENT 1

Federal policy favoring arbitration must not be regarded as so powerful as to completely eliminate Congressional intent to have federal courts as primary vehicles for enforcement of civil rights claims.

A long time ago this Court made clear that federal policy favors arbitration as a means to resolve labor disputes. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior &Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) this Court was for the first time called

upon to decide whether such powerful policy in favor of arbitration trumped an employee's right to judicial redress in a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* The Court held that an arbitration clause in a collective bargaining agreement did not preclude an employee from bringing a Title VII claim in court. The Court stated in no equivocal terms: "we think it clear that there can be no prospective waiver of an employee's rights under Title VII." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974).

However, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) this Court held that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (FAA), required the enforcement of an agreement to arbitrate a claim under the Age Discrimination in Employment Act (ADEA). The Court distinguished *Gardner-Denver* on the grounds that it involved a collective bargaining agreement, as opposed to a private contract, and in that plaintiff therein had not agreed to arbitrate Title VII claims. The Court emphasized that the arbitration agreement did not require waiver of any substantive rights under Title VII, only their enforcement in a different forum. But the *Gardner-Denver* court did not refuse to enforce arbitration because it would have forced waiver of substantive rights under Title VII, but because "[t]he rule's obvious consequence in the present case would be to deprive the petitioner of his statutory right to attempt to establish his claim in a federal court." *Gardner-Denver, supra* at p. 55. The Court went on to say that

> The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal.

> Furthermore, we have long recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." *U.S. Bulk Carriers* v. *Arguelles,* 400 U.S. 351, 359-360 (1971) (Harlan, J., concurring). Respondent's deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.
>
> *Id.*

The *Gardner-Denver* court further noted that even if the tensions between contractual and statutory rights could be allayed by a contract containing language similar to Title VII, still federal courts should be the preferred forum.[3] Clearly,

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[3] The Court stated that "[t]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-583 (1960). . . [T]he resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts. Moreover, the fact finding process in arbitration usually is not equivalent to judicial fact finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. See *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203 (1956); *Wilko v. Swan,* 346

the *Gardner-Denver* court based its decision not on the particular features of collective bargaining agreements, but on the recognition that a right to a federal court forum for adjudicating Title VII claims, while not a substantive right, was more important than the general policy favoring arbitration.

Nonetheless, this Court in *Gilmer* further distinguished *Gardner-Denver* and its progeny[4] on the ground that these cases had not been decided under the FAA. The Court emphasized that other statutory rights had been held to be subject to mandatory arbitration, such as the Sherman Act, 15 U.S.C. §§ 1-7; § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.;* and § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771 (2). *Gilmer, supra,* at p. 26, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220 (1987); *Rodriguez de Quijas v.*

U.S., at 435-437. And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award. "*United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S., at 598. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts." *Alexander v. Gardner-Denver,* 415 U.S. 36, 57-58 (1974).

[4] See, *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981), and *McDonald v. City of West Branch,* 466 U.S. 284 (1984).

Shearson/American Express, Inc., 490 U.S. 477 (1989). But application of the FAA should not render the *Gardner-Denver* evaluation of the role of federal courts in Title VII claims inapplicable. After all, the FAA has been in existence since 1925. Rather, it merely makes clear that despite any shortcomings arbitration also has a role in the Title VII scheme.

Prior to *Gilmer* it was well understood that Title VII were simply not subject to arbitration under any circumstances. In *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984), this Court stated without qualification that Gardner-Denver established that arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory" rights embodied in Title VII.[5]

It is apparent, however, that in between *Gardner-Denver* and *Gilmer*, the pendulum had swung all the way to favor arbitration.[6] In fact, the Court in *Gilmer* seemed to

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[5] See, *Armijo v. Prudential Insurance Co.*, 72 F.3d 793 (10th Cir. 1995(Jenkins, J., concurring). See also, *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104, 105-08 (5th Cir. 1990); *Utley v. GoldmanSachs & Co.*, 883 F.2d 84, 185-87 (1st Cir. 1989); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1305-07 (8thCir. 1988); *Rosenfeld v. Department of Army*, 769 F.2d 237, 239(4th Cir. 1985); *EEOC v. Children's Hosp. Medical Ctr.*, 719 F.2d 1426,1431 (9th Cir. 1983) (en banc) (Fletcher, J., concurring).

[6] The FAA was passed to counter a perceived hostility in the courts toward arbitration grounded on the belief that the courts are better suited place to resolve disputes. The specific purpose of the statute was to put arbitration on the same footing as any other contract. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24

contradict *Gardner-Denver's* criticism of arbitration in the context of Title VII claims. The Court rejected Gilmer's contentions that the shortcomings of arbitration made it altogether an inappropriate forum for civil rights claims. *Gilmer* at pp.32-33. This is not quite the same as saying that arbitration is as good a forum as a court, but rather that it provides the basic guarantees of a fair adjudication, and as such, its use does not contravene the purposes of civil rights statutes. Thus, while application of the FAA may require arbitration of Title VII claims, it must still be recognized that the right to their determination in a judicial forum is a very important right with a special place in accomplishing the goals of the statute.

The Court in *Gilmer* could have well overruled *Gardner-Denver*, but it chose not to do so, and instead sought to distinguish it. It seems therefore that this Court, by holding that nothing in the text of the ADEA, and implicitly Title VII, shows Congressional intent to preclude arbitration, did not wish to completely wash away *Gardner-Denver's* teaching that Congress did intend for courts to have a preeminent role in the enforcement of Title VII claims, and that the right to a judicial forum is a very important one in civil rights cases.[7] One thing is to say that nothing in Title VII

(1991).

[7] See also, *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982) (stating that "the federal courts were entrusted with the ultimate enforcement responsibility" under Title VII); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting)(stating that federal courts should not defer to arbitration of Title VII claims "reached by the same combination of forces that had long perpetuated invidious discrimination").

indicates a desire to trump the FAA's mandate to favor arbitration and quite another is to say that so long as the FAA applies to an employment dispute Title VII's preference for judicial resolution is no longer deserving of any deference. These concerns must still have a role and impact upon resolution of disputes. In other words, while Congress did not intend Title VII to preempt the FAA, and *Gilmer* makes this clear, it also did not intend to prefer arbitration over judicial adjudication of Title VII claims, or completely forego its enforcement scheme in favor of arbitration.

The Court of Appeals based its decision upon Tenth Circuit precedent which without much factual analysis concentrated upon *Gilmer's* instruction to prefer arbitration. *Armijo v. Prudential Insurance Company*, 72 F.3d 793 (10th Cir. 1995) and *Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482 (10th Cir. 1994). See Appendix A, p. 3a. These cases patently focused upon liberal interpretation of arbitration clauses and resolution of any doubts in favor of arbitration. It is true that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," *see Armijo, supra* at p. 797, but this should not amount to a disregard for the importance of judicial redress for Title VII claims. *Gilmer* itself instructs that courts must look for fraud, overreaching or other grounds for revocation of contracts. *Gilmer* at p.33. This clearly demands careful factual determinations as to the intent of the parties.

In the case at bar the Court of Appeals acknowledged that Petitioner/Plaintiff did not know she was agreeing to arbitrate Title VII claims, that the effect of the agreement was not explained to her and that she was not provided with a copy of the NASD rules, but decided that pursuant to well-settled rules of contract law that a party to an agreement is charged with knowledge of the terms of the agreement. (See

Appendix A, pp. 2a-3a). The court also noted that there was no compelling factual distinction requiring a different result from *Armijo* and *Metz*. *Id.* at p. 5a. The court never mentioned or evaluated the fact that Petitioner/Plaintiff was told that signing the U-4 form was a mere formality. (See Appendix G). Petitioner's Affidavit, Appendix G, was the only evidence in front of the court on the issue of contract formation. Petitioner submits that application of contract law to these facts commands the opposite result. Another well accepted rule of contract law is that any ambiguities must be resolved against the drafter, particularly in cases of "boilerplate" contracts. *Wille v. Southwestern Bel Tel. Co.*, 219 Kan. 755 (1976) . It must be remembered here that Petitioner/Plaintiff signed the U-4 in 1988, that the form does not itself say that civil rights claims would be subject to arbitration, or that all disputes will be arbitrated. It merely says that only those disputes covered by NASD rules would be arbitrated. And at that time NASD rules did not even specifically mention employment or termination disputes[8]. Yet another principle of contractual law is that a party has a duty to disclose and not conceal terms the party knows when the other party does not know them. *Squires v. Woodbury*, 5 Kan.App.2d 596 (1980). Here, Respondent in fact

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[8] The language involved provided for arbitration of "[a]ny dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code.[6] On October 1, 1993, the NASD Code was amended to include claims "arising out of the employment or termination of employment of suchassociated person(s) by and with such member." *Renteria* v. *Prudential Ins. Co. of America*, 113 F.3d 1104 (9th Cir. 1997).

misrepresented the effect of the agreement. Thus, overly eager following of *Gilmer* resulted in this case not placing arbitration on the same footing as any other contract, but as entitled to a selective application of contractual principles that supported arbitration. It seems that at least in this important context, all facts and contractual principles should be carefully weighed before doubts are resolved in favor of arbitration.

But even if the duty to learn the terms of the agreement fell upon Petitioner and was determinative on the issue of contractual responsibility, surely this is the type of overreaching against which *Gilmer* warned. This is the only position which is consistent with the purposes of Title VII, even with all healthy regard toward arbitration. It seems that regardless of whatever the law of a particular state may provide, when a party is asked to waive important federal rights, such should not be accomplished by means of trickery, ambiguity, or coyness. Instead, a party should have the duty to duly notify and make sure the other party is aware that he or she is waiving important rights. This is the only result that gives some role, credence, weight and deference to congressional intent in the overall scheme of civil rights laws.

ARGUMENT 2

Congress intended to either preclude compulsory Arbitration of Title VII claims, or to make arbitration only a complement, not a prospective substitute for the availability of judicial relief for these claims.

It is well acknowledged that Congress intended for arbitration not to supplant the judicial forum, but to be an aid and complement to Title VII enforcement and public policy

mechanism.[9] This is made evident in the 1991 amendments to the Civil Rights Act of 1964 (CRA). These amendments were passed shortly after this Court's ruling in *Gilmer*, and included two important provisions. Section 118 of the 1991 CRA amendments provides that

> [w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.
>
> Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991).

In addition, the 1991 CRA for the first time gave plaintiffs the right to trial by jury.

Courts are split as to the effect of the 1991 CRA amendments on arbitration agreements.

In *Duffield v. Robertson, Stevens & Co,* 144 F.3d 1182 (9th Cir. 1998) the court held that the "where appropriate" language of § 18 of Civil Rights Act of 1991, when viewed in light Congress' obvious desire to expand Title

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[9] It seems highly unlikely that Congress would have envisioned or would tolerate a widespread use of contracts requiring employees to arbitrate Title VII claims. That would at least seem inconsistent with granting employees the right to trial by jury in these claims. Yet, *Gilmer* has that potential consequence. If *Gilmer* were interpreted to eliminate any regard for congressional preference for judicial resolution of Title VII claims, all employers across the country could have every American worker agree to arbitration of Title VII claims, except for workers directly engaged in the transportation of goods in interstate commerce.

VII rights, meant that arbitration of existing disputes is encouraged as an alternative means of dispute resolution, not that employers may force arbitration in place of a judicial forum for possible disputes in the future. *Id.* At 1194. This makes sense, for otherwise judicial redress of Title VII claims could be put out of existence by contract. The court also noted that the "to the extent authorized by law" language referred to the status of the law prior to *Gilmer*, which, as above noted, was that pre-dispute agreements to arbitrate did not apply to Title VII cases. *Id.*. Further, the *Duffield* court's extensive analysis of the legislative history of § 18 makes it clear that it was not a codification or endorsement of *Gilmer*. *Id.* At pp. 1196-1197. Since the intent was to supplement, not supplant judicial forums as a means to enforce Title VII. It makes little sense that Congress was endorsing a vehicle to completely replace judicial redress.

The Third Circuit in *Seus v. John Nuveen & Co.*, 146 F.3d 175,179, 182-83 (3d Cir. 1998), held that the 1991 CRA did not evince congressional intent to preclude compulsory arbitration agreements, and found that the "to the extent authorized by law" language of § 18 refers to the FAA. Application of the FAA, the court thought, was controlled by *Gilmer*.

In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1 (1st Cir. 1999) the court also disagreed with *Duffield's* conclusion that the "authorized by law" language referred to the law as it existed prior to *Gilmer*. The court also thought it was unnecessary to resolve the issue of whether such language refers only to the FAA. The court further emphasized that because the arbitration clause did not even require arbitration of *all* disputes, and since the NYSE rules were not provided to the prospective employee, he did not have notice that the agreement encompassed Title VII

claims, and a waiver of any rights there under could not have been voluntary. *Id.* At p. 19. The court, however, did not think it was necessary to resolve the issue of whether a "heightened" standard requiring "knowing and voluntary" waivers applies to compulsory arbitration clauses in Title VII cases. *Rosenberg,* at p. 19. Rather, the court found that the particular agreement at issue, which is in all respects nearly identical to the one involved in the case at bar, was not enforceable because it was not "appropriate," as required by § 18 of the 1991 CRA. The court based its ruling on the fact that at the time the employee signed the U-4 form containing the arbitration clause, the clause said nothing about arbitration of employment disputes, but merely referred to NYSE rules. *Rosenberg*, at p. 18. This is also true in the case at bar. Finally, the employee in *Rosenberg* had not been provided with a copy of the NYSE rules nor were the rules explained to him to alert him to its impact on Title VII claims. *Id.* That is also true in the case at bar. In addition, however, in the case at bar, Petitioner was actually told that the form was a mere formality. (See, Appendix G).

The *Rosenberg* court found it very important that the U-4 form which plaintiff had been required to sign contained a certification by the employer that the employee was familiar with the NYSE rules, and that the employer falsely made such certification when in fact the employee had not been provided a copy of the rules.[10] The same language is present in the

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[10] The specific language provided: "To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitutions(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made

case at bar, and just as in *Rosengerg*, Petitioner here was not provided with a copy of the NASD rules and was clearly not familiar with them when she signed the U-4 form. (See Appendix G). Under these circumstances, the court concluded that it was inappropriate to enforce such agreement, given the language, purpose and intent of the 1991 CRA.

In reaching this conclusion, the Court also relied on this Court's recent case of *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1988) where the Court held that that it would not be "appropriate" to enforce agreements which do not clearly and unmistakably state that ADA claims are subject to compulsory arbitration in the context of a collective bargaining agreement. The *Rosenberg* court held that it was appropriate that a lesser standard of at least some minimum of notice should apply to private contracts. *Rosenberg*, at p. 20. This

Interpretation of the 1991 CRA also resulted in denial of compulsory arbitration of a Title VII claim in *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994). *Lai* involved the same defendant as in the case at bar, and the same U-4 agreement involved here. The court recognized that pursuant to *Gilmer* arbitration was not precluded in this Title VII case. But the court noted that *Gilmer* did not stand for the proposition that arbitration agreements are enforceable in every case. The court court held that particularly in view of the 1991 CRA, some deference or protection should be afforded to the overall enforcement scheme of Title VII, requiring at least that waivers of the right to a judicial forum

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herein." *Rosenberg*, at p. 20.

should be knowing and voluntary.[11] The court refused to enforce the arbitration agreement because the employees, just as in the case at bar, had not been provided with a copy of the rule and were told that signing the U-4 form was a mere formality. Thus, they did not knowingly or voluntarily waive any rights under Title VII.

In *Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104 (9th Cir. 1997) the court extended the holding in *Lai* to facts even closer to the case at hand. The court explained that even though the NASD had amended the rules after the employees signed the U-4 form to specifically include disputes arising from termination of employment, and the employees had agreed to arbitrate pursuant to those rules "as amended," at the time they signed the form they did not know or could have voluntarily waived Title VII rights. *Id.* at 1107.

Other circuits have simply followed *Gilmer* without specific reference to the 1991 CRA.[12] In *Patterson v. Tenet*

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[11] Quite significant in this context is the statement of Senator Robert Dole on the subject: "[this provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods." *See* 137 Cong. Rec. S15,472-01,S15,478 (daily ed. Oct. 30, 1991).

[12] See, *Seus* v. *John Nuveen & Co.*, 146 F.3d 175,179, 182-83 (3d Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3323 (U.S. Oct 19, 1998) (No. 98-719); *Paladino v.Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir.1998); *Gibson* v. *Neighborhood Health Clinics, Inc.*, 121 F.3d 1126,1130 (7th Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Cole* v. *Burns Int'lSec. Servs.*, 105 F.3d 1465, 1467-68

Healthcare,Inc., 113 F.3d 832, 837 (8th Cir. 1997) the court merely mentioned that arbitration of Title VII claims finds support in the 1991 amendments, but did not discuss congressional intent as to when it is appropriate. In *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4thCir. 1996) the court stated that the 1991 CRA made it clear that Congress favored arbitration of Title VII claims. This should not, however be interpreted to mean that Congress *preferred* arbitration over judicial relief. And importantly, the *Austin* court, after reviewing the legislative history of the statute, stated: "[w]e need not decide what the legislative history means in absolute terms because in our case it means that voluntary agreements to arbitrate statutory claims are allowed." *Id.*

ARGUMENT 3

Conduct that is inconsistent with the right to compel arbitration, even if it occurs before court litigation of a Title VII claim, should result in waiver of the right to arbitrate.

The Court of Appeals held that Respondent's participation in proceedings before the Kansas Human Rights Commission for several years did not result in waiver of the right to compel arbitration because Respondent moved to compel immediately after court proceedings started. The

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(D.C. Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4thCir. 1996); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308, 312 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir.1991).

Court relied upon *Metz v. Merrill Lynch, Pierce,Fenner & Smith*, 39 F.3d 1482 (10th Cir. 1994). *Metz* set forth the factors applicable to the issue of waiver of the right to arbitration as follows:

> 1. whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without askingfor a stay of the proceedings; (5) "whether importantintervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration had taken place"; and (6) whether the delay "affected, misled, or prejudiced the opposing party.

Metz, 39 F.3d at 1489 (citations omitted).

The court considered that all these factors apply only after court litigation has started relying upon the statement in *Gilmer* that ". . . the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991). However, *Gilmer* was clearly referring to proceedings before the EEOC, with emphasis upon the fact that the role of this agency is not to adjudicate claims, but rather to aid in their resolution by

conciliation and persuasion. The EEOC thus is not a place where a victim of discrimination can seek an order or judgment providing relief. The Kansas Human Rights Commission, however has such powers. A party such as Petitioner here can go there expecting that upon investigation the Commission can and will grant relief, and order Respondent to pay it. Participation before such an agency for several years, instead of invoking the right to have an arbitrator determine the rights of the parties, is inconsistent with that right and waives that right. Thus, the Court of Appeals erred in failing to consider the adjudicatory powers of the Kansas Human Rights Commission and apply the factors set forth in *Metz* to such participation.

CONCLUSION

Congress intended that federal courts have a plenary role in the enforcement of Title VII claims. Congress also intended that the Federal Arbitration Act curb judicial hostility toward arbitration. These policies should not be regarded as competing. They were in fact intended to be complementary of one another. As such, some measure of protection should be afforded to victims of discrimination who are asked to waive their right to judicial adjudication of their claims, so that such waiver is knowing and voluntary, or at least with sufficient notice of the consequences of signing waiver documents. In the case at bar a prospective employee was made to sign a form that did not itself say anything about waiver of important rights, she was not provided with documents which were referred to in the form, those documents themselves did not say anything about arbitrating employment or statutory disputes, she was told that the agreement was a mere formality, and she in fact had no idea that she was waiving substantial rights. It is hard to believe

that Congress intended that Title VII rights could be waived under such circumstances.

Prior to *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) Title VII was deemed to preclude arbitration. By the time *Gilmer* was decided the pendulum had swung fully on the side of arbitration to the point that it is applied as a juggernaut that crushes any other legislative interest. It is time to stop the pendulum at a place that promotes legislative interests in arbitration as an alternative forum and judicial access for redress of civil rights violations.

/s/_____

Cynthia D. Dexter
3100 Broadway, Suite 319
Kansas City, Missouri 64111

Petitioner pro se

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNPUBLISHED OPINION.

[Filed June 7, 2000]

No. 99-3137
(D.C. No. 96-2192-KHV)

CYNTHIA D. DEXTER,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
THE PRUDENTIAL INSURANCE	)
COMPANY OF AMERICA;	)
BILL S. PINKERTON; JOHN	)
DEVANEY; JACK PALMER;	)
FRED DIMMEL, II; JIM	)
NOVACK; STEVE ZADEH,	)
Defendants-Appellees.	)
	)

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and

Before **BRORBY** and **McWILLIAMS**, Circuit Judges, and **ELLISON**, Senior District Judge.**

Plaintiff-Appellant, Cynthia Dexter, was employed as a sales representative for Defendant-Appellee, Prudential. Prior to her employment she signed a U-4 form as part of the requirements for registration as a representative affiliated with the National Association of Securities Dealers ("NASD"). The form contained a clause by which she agreed to arbitrate claims or controversies "required to be arbitrated under the rules, constitution or by-laws of the organizations with which I register. . .". The NASD Code of Arbitration Procedure requires arbitration of any employment disputes.

On April 19, 1996 Plaintiff filed her complaint charging Prudential and certain individual Defendants with sexual harassment, maintenance of a hostile work environment, gender discrimination, and retaliation. On July 17, 1996, Defendants filed their first responsive pleading, a Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration, citing the U-4 form signed by Dexter at the time of her employment. Plaintiff's response urged that the U-4 form was boiler-plate, that the effect of the agreement was not explained to her and that she was not provided with

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judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

** The Honorable James O. Ellison, Senior United States District Judge, Northern District of Oklahoma, sitting by designation.

a copy of the NASD rules, which specified that employment matters were subject to arbitration.

On October 7, 1996, the District Court entered an order sustaining Defendants' Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration "for the reasons stated in Defendants' memoranda." Defendants' memoranda in support of a stay and compelling arbitration relied in part on *Armijo v. Prudential Insurance Company*, 72 F.3d 793 (10th Cir. 1995). *Armijo* involved the same corporate defendant and the same U-4 application form having the same mandatory arbitration language as in the instant case. The *Armijo* court decided, in pertinent part, that "[q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration", that the plaintiffs had "failed to rebut the presumption of arbitrability," and that arbitration clauses must be interpreted liberally, and any doubts should be resolved in favor of arbitration." *Id.* at 797-98.

Defendants also relied, in their memoranda, on the holding of this court in *Metz v. Merrill Lynch, Pierce, Fenner and Smith,* 39 F.3d 1482 (10th Cir. 1994), wherein the Court stated, "our reading of *Gilmer* . . . supports the conclusion that Title VII claims are subject to compulsory arbitration." *Id.*, at 1487 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26(1991)). Lastly, Defendants relied upon well-settled rules of contract law that a party to an agreement is charged with knowledge of the terms of the agreement in responding to Plaintiff's argument that she was unaware that the U-4 form contained mandatory arbitration language. *See e,g.*, 17 Am.Jur.2d Contracts § 224(1991). Thus, the District Court compelled

arbitration and stayed proceedings pending arbitration based on *Armijo, Metz*, and fundamental principles of contract law.

In October of 1997 Plaintiff's counsel withdrew from the case and new counsel filed a Motion to Reconsider the Court's Order of Stay and Compelling Arbitration. The motion to reconsider was based upon a theory that Prudential's election not to invoke its right to arbitration during administrative proceedings before the EEOC and the Kansas Human Rights Commission (KHRC) constituted a waiver of such right. Plaintiff's first charge was filed with the EEOC in August of 1993. Thereafter, Plaintiff filed three separate charges with the KHRC in October 1993, August 1994 and April 1995. Prudential participated in these administrative proceedings.

Prudential responded to Plaintiff's Motion to Reconsider Order of Stay by urging that an employer cannot waive its right to arbitrate by participating in proceedings at the administrative level, urging that the EEOC and KHRC proceedings are considered non-adversarial and conciliatory, designed to reach a settlement of issues. The District Court on October 29, 1997 overruled plaintiff's Motion to Reconsider the Order of Stay and Compelling Arbitration, again "for the reasons stated in Defendants' Response to Plaintiff's Motion to Reconsider Order of Stay."

The matter proceeded to arbitration which resulted in a denial of each of Plaintiff's claims. The fairness or propriety of the arbitration award is not an issue on appeal. The two issues for review are whether the District Court was correct in its original Order of Stay and Compelling

Arbitration and its Order denying Appellant's Motion to Reconsider that Order.

This Court reviews the district court's grant of a Motion to Compel Arbitration and its Motion to Reconsider the Order of Stay and Compelling Arbitration *de novo* applying the same legal standard employed by the District Court. *Mid-America Federal Sav. and Loan Ass'n. v. Shearson/American Express, Inc.*, 886 F.2d 1249, 1259. (10th Cir. 1989).

Although the orders appealed from provide little guidance to this appellate court, the applicable law is clear. *Armijo, Metz*, and fundamental principles of contract law are dispositive.

Clearly the District Court was correct on both issues. This Court, in *Armijo*, addressed the identical issue involving the same Defendant and a U-4 form having the same mandatory arbitration language and affirmed a district court's decision to compel arbitration. There is no compelling factual distinction which would require a different result in this case.

With respect to the argument of waiver, the *Metz* Court specifically discussed the factors to consider in determining whether a party has waived its right to arbitration:

> (1)whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party

> notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced: the opposing party.

Metz, 39 F.3d at 1489 (citations omitted). We conclude, in considering these factors, that no waiver took place. The Defendant here, when litigation was commenced, filed as its first responsive pleading, a "Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration" meeting the requirement of *Metz*. There was no waiver of arbitration, only a timely demand for it.

In addition, the Supreme Court of the United States, in *Gilmer v. Interstate/Johnson Lane Corp.,* in addressing whether an ADEA claim is precluded from arbitration, stated: ". . . the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." Clearly it was not contemplated that participation in administrative proceedings would operate to waive a contractual right to arbitration.

The decision of the District Court is Affirmed.

Entered for the Court

James O. Ellison
Senior United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

[Filed March 18, 1999]

No. 96-2192-KHV

CYNTHIA D. DEXTER	)
	)
v.	)
	)
PRUDENTIAL INSURANCE COMPANY OF AMERICA, BILL S. PINKERTON, JOHN DEVANEY, JACK PALMER, FRED DIMMEL, II, JIM NOVACK, and STEVEN ZADEH.	)

JUDGMENT IN A CIVIL CASE

( ) **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **DECISION BY THE COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum And Order (Doc. #49) filed on March 17, 1999 and entered on the docket on March 18, 1999, Plaintiff's Motion To Vacate Arbitration Award (Doc. #45) is OVERRULED and dismissal is entered in favor of defendants.

Dated: March 18, 1999

RALPH L. DeLOACH CLERK

/s/_____
Linda South, Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

[Filed March 17, 1999]

No. 96-2192 KHV

CYNTHIA D. DEXTER,
Plaintiff,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, et al.,
Defendants.

MEMORANDUM AND ORDER

On October 7, 1996, the Court sustained Defendants' Motion to Compel Arbitration and For A Stay Pending Arbitration (Doc. # 6). The arbitral proceedings have now been completed, and on July 28, 1998, the arbitration panel issued an award which denied relief on plaintiff's claims for sexual harassment, gender discrimination and retaliation in violation of Title VII and the Kansas Acts Against Discrimination, retaliatory discharge and breach of an implied contract to stop unlawful harassment in the workplace. See Complaint (Doc. # 1) filed April 19, 1996. The matter comes

before the Court on Plaintiff's Motion To Vacate Arbitration Award (Doc. #45) filed October 26, 1998. Having considered the arguments of counsel, and carefully reviewed the very limited record in this case, the Court finds that said motion should be overruled.

Plaintiff's basic complaint is that the arbitration procedure lacked the basic fairness and due process required by the Fourteenth Amendment, in that through defendant's misconduct, she was denied the right to confront and cross examine the witnesses. She faults the arbitration procedure because it did not allow her to conduct depositions and certain other discovery in advance of trial, and she faults the panel for failing to insure that she received all relevant evidence in the hands of defendant. Plaintiff's primary criticism concerns the fact that though defendant produced hundreds of pages of documents, it did not designate their sources. According to plaintiff, the lack of source information prevented her from successfully cross-examining, impeaching and refreshing the recollection of various witnesses, through documents from their own files.[1] According to plaintiff, the lack of source information also prevented her from learning the identities of

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[1] Plaintiff admits that virtually all of the documents were self-identifying, in that their sources were evident from their content. She does not identify any particular documents that were not self-identifying. Nor does she show how any particular document impaired her ability to prosecute her claims because its source was unknown.

some witnesses prior to the hearing.[2] Plaintiff insists that these procedural defects prevented her from proving that defendant's management conspired to cover up her complaints.[3]

Neither party has provided the Court a transcript of the arbitration proceedings. From the briefs of the parties, it appears that plaintiff called twelve witnesses and introduced 63 exhibits over the course of a six-day proceeding. The panel apparently required defendant to produce, at its expense, any company witness that plaintiff requested. Plaintiff does not claim that she lacked notice of the proceedings or the issues to be resolved. Except to the extent outlined above, plaintiff does not claim that she was denied an opportunity to be heard and to present relevant and material evidence and argument on her claims. Nor does she does not suggest that the arbitrators were biased.

The Federal Arbitration Act allows a reviewing court to vacate an arbitration award in limited circumstances, including where the award was procured by corruption, fraud or undue means; where there existed evident partiality or corruption by the arbitrators; where there existed specified misconduct by the arbitrators; or where the arbitrators exceeded their powers. 9 U.S.C.A. § 10. Plaintiff does not

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[2] Plaintiff cites no example of a witness whose identity were undisclosed until the time of the proceeding.

[3] The Court does not understand plaintiff to complain that the procedural deficiencies prevented her from proving the elements of her underlying claims.

assert that any of these statutory grounds have been proven. Rather, she invokes those cases which have eschewed a strict reading of 9 U.S.C.A. § 10 and created a basic requirement that an arbitrator must grant the parties "a fundamentally fair hearing." As noted above, she asserts that the arbitral award in this case must be vacated for lack of a fundamentally fair hearing. E.g., Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990) (in reviewing district court's vacatur, question is whether arbitration proceedings were fundamentally unfair); Hoteles Condado Beach v. Union de Tronquistas Local 901, 763 F.2d 34, 40 (1st Cir. 1985) (vacatur appropriate when exclusion of relevant evidence "so affects the rights of a party" as to deny fair hearing); National Post Office Mailhandlers v. United States Postal Service, 751 F.2d 834, 841 (6th Cir. 1985) (standard for judicial review of arbitration procedures is merely whether party to arbitration has been denied fundamentally fair hearing); Hall v. Eastern Air Lines, Inc., 511 F.2d 663, 663-64 (5th Cir. 1975) (review not foreclosed where petitioner alleges denial of fundamental due process); Bell Aerospace Co. Div. of Textron v. Local 516, Int'l Union, 500 F.2d 921, 923 (2d Cir. 1974) (arbitrator need not observe all niceties of federal courts, but only grant fundamentally fair hearing).

In Bowles Financial Group. Inc. v. Stifel, Nicholas & Co., Inc., 22 F.3d 1010 (10th Cir. 1994), the Tenth Circuit outlined what constitutes a "fundamentally fair hearing," as follows:

> The courts seem to agree that a fundamentally fair hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the

> decision makers, and that the decisionmakers are not infected with bias. See Robbins v. Day, 954 F.2d 679, 685 (11th Cir.) "[T]he Federal Arbitration Act allows arbitration to proceed with only a summary hearing and with restricted inquiry into factual issues"), *cert. denied*, 506 U.S. 870, 113 S.Ct. 201, 121 L.Ed.2d 143 (1992); Employers Ins. of Wausau, 933 F.2d at 1491 (fair hearing is based on notice, opportunity to be heard and to present evidence, and lack of biased decisionmaking); Sunshine Mining Co. v. United Steelworkers of Am., 823 F.2d 1289, 1295 (9th Cir. 1987) ("hearing is fundamentally fair if it meets the 'minimum requirements of fairness'--adequate notice, a hearing on the evidence, . . . impartial decision") (quoting Ficek v. Southern Pacific Co., 338 F.2d 655, 657 (9th Cir. 1964), *cert. denied*, 380 U.S. 988, 85 S.Ct. 1362, 14 L.Ed.2d 280 (1965)); Hoteles Condado Beach, 763 F .2d at 39 (arbitrator must give each party an adequate opportunity to present evidence and arguments).

22 F.3d at 1013. Plaintiff has not proven that she was subjected to a fundamentally unfair hearing under this standard. She does not complain that defendant violated the agreed rules of arbitration, but only that without judicial rules of discovery and evidence, the proceeding was fundamentally unfair.

The Court disagrees. First, the arbitration panel did order discovery prior to the six-day hearing, and defendant produced hundreds of pages of documents. The fact that plaintiff was unable to discover every piece of evidence does not mean that she did not receive a fundamentally fair hearing. Tonkovich v. Kansas Board of Regents, 159 F.3d 504, 520 (10th Cir. 1998). Even under the Federal Rules of Civil Procedure and the Federal Rules of Evidence, plaintiff was not guaranteed that a right to discover every piece of evidence she desired. As noted above, plaintiff had notice of all claims and defenses, well before the hearing. She was able to call witnesses and cross-examine defense witnesses, albeit not in exactly the way she would have liked. As plaintiff admits, most of the documents were self-identifying. For those which were not, plaintiff has not adequately shown how she was denied the right to cross- examine adverse witnesses. On this record, the Court cannot say that the problems with document identification and cross-examination violated plaintiff's right to a fundamentally fair hearing.

The record reveals no evidence that the decision of the arbitrators was not well grounded in fact and law. The factual evidence refutes plaintiff's contention that she failed to receive a fundamentally fair hearing. As the Tenth Circuit noted in Bowles Financial Group, Inc. v. Stifel, Nicholas & Co., Inc.,

> Arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system. Those who choose to resolve a dispute by arbitration can expect no more than they have agreed. One choosing arbitration should not expect the full panoply

> of procedural and substantive protection offered by a court of law. In short, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the [perceived] simplicity, informality, and expedition of arbitration."'

22 F.3d at 1011. Courts have a limited function when called upon to confirm or vacate an arbitration award, and that function includes only such review as is necessary to ensure arbitrators that comply with statutory requirements. See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987). Moreover, as noted above, plaintiff's complaint is that she was denied the opportunity to prove that defendant's management conspired to cover up her complaints - not that she was denied the opportunity to prove her underlying claims. In this context, the procedural errors and deficiencies which plaintiff has identified do not merit reversal under the standard identified above.

IT IS THEREFORE ORDERED that Plaintiff's Motion To Vacate Arbitration Award (Doc. # 45) filed October 26, 1998, be and hereby is overruled. The Clerk is directed to enter a judgment of dismissal in favor of defendant.

Dated this 17th day of March, 1999, at Kansas City, Kansas.

/s/ _____
Kathryn H. Vratil
United States Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

[Filed October 29, 1997]

No. 96-2192-KHV

CYNTHIA D. DEXTER,
Plaintiff,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, et al.
Defendants.

ORDER

On October 7, 1996, the Court sustained defendants' motion to compel arbitration and for a stay pending arbitration. This matter is currently before the Court on Plaintiff's Motion To Reconsider Order Of Stay And Compelling Arbitration (Doc. #29) filed October 6, 1997. Plaintiff's motion is hereby overruled for the reasons stated in defendants' Response To Plaintiff's Motion To Reconsider Order Of Stay (Doc. #35) filed October 22, 1997.

IT IS SO ORDERED.

Dated this 29th day of October, 1997, at Kansas City, Kansas.

KATHRYN H. VRATIL
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

[Filed October 7, 1996]

No. 96-2192-KHV

CYNTHIA D. DEXTER,
Plaintiff,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, et al.
Defendants.

ORDER

Defendants' Motion to Compel Arbitration and For A Stay Pending Arbitration (Doc. #6) filed July 17, 1996, is hereby sustained for the reasons stated in defendants' Memorandum (Doc. #7) filed July 17, 1996 and Defendants' Memorandum in Further Support (Doc. #12) filed September 3, 1996. All proceedings in this case are stayed, pending arbitration. Plaintiff's counsel shall submit a status report on January 5,1997 and at 90-day intervals thereafter.

IT IS SO ORDERED.

DATED this 7th day of October, 1996, at Kansas City, Kansas.

/s/_____
Kathryn N. Vratil
United States District Judge

APPENDIX F

LETTER FROM CLERK, U.S. SUPREME COURT

[Dated August 23, 2000]

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

August 23, 2000

Mr. Aldo P. Caller
3100 Broadway
Suite 319
Kansas City, MO 64111

Re: Cynthia D. Dexter
v. Prudential Insurance Company of America, et al.
Application No. 00A167

Dear Mr. Caller:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Breyer, who on August 23, 2000, extended the time to and including November 4, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

/s/_____
Melissa A. Blalock
Assistant Clerk

NOTIFICATION LIST

Mr. Aldo P. Caller
3100 Broadway
Suite 319
Kansas City, MO 64111

Mr. John J. Yates
3500 One Kansas Place
1200 Main Street
Kansas City, MO 64105

Clerk
United States Court of Appeals for
the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT COURT OF KANSAS

[Dated August 13, 1996]

No. 96-2192-KHV

CYNTHIA D. DEXTER, *Plaintiff,*	)
v.	)
THE PRUDENTIAL INSURANCE CO. OF AMERICA, BILL S. PINKERTON, JOHN DEVANEY, JACK PALMER, FRED DIMMEL, II, JIM NOVACK, STEVE ZADEH. *Defendants.*	)

AFFIDAVIT OF CYNTHIA D. DEXTER

COMES NOW, Cynthia D. Dexter, under oath, and states:

1. During August of 1988, I first interviewed with Harry (Butch) Colvin, District Manager, and applied for a position with Prudential as an underwriter.

2. Mr. Colvin, at this time, stated that due to my potential to earn more money, I should consider a position as a insurance agent and convinced me to take the Life Insurance Marketing Research Association Standardized Test.

3. Between approximately August, 1988 and November, 1988, I took classes, as directed by Mr. Colvin to obtain the licenses I was told would be necessary for my future employment with Prudential.

4. During this time period, I had periodic meetings with Mr. Colvin. During these meetings we discussed my progress through the training and licensing procedures.

5. On or about November 11, 1988, during one of these meetings, I was given the Form U-4 to sign. Mr. Colvin represented the execution of the Form U-4 as a formality which was a prerequisite of my employment with Prudential.

6. It was never explained to me that the U-4 Form contained any agreement to arbitrate any matter nor was it ever explained how disputes between myself and clients or the company would be resolved.

7. I was never provided with a copy of the form U-4 Form that I had signed.

8. I was never provided with a copy of the rules, constitution or by-laws of the National Association of Security Dealers.

9. I was never given a copy of the NASD Code of Arbitration.

10. I was never asked to waive my statutory rights under federal or state law.

11. I never knowingly agreed to submit issues or controversies arising out of my employment or termination of my employment to arbitration.

AFFIANT FURTHER SAITH NAUGHT

/s/_____
CYNTHIA D. DEXTER

STATE OF MISSOURI)
) **ss.**
COUNTY OF JACKSON)

Subscribed and sworn to before me, a Notary Public, this 13th day of August, 1996.

/s/_____
Joanna L. Tinkey
NOTARY PUBLIC

My Commission Expires:
March 19, 1999